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Supreme Court, U.S.
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No. 001138 JAN 16 2001

IN THE

Supreme Court of the United States

MIGUEL PEREZ,

Petitioner,

v.

Z FRANK OLDSMOBILE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Seventh Circuit violate the Rules of Decision Act when it *sua sponte* decided an issue of state law based on the panel's view concerning the "best" rule of law, and identified no state law to support its conclusion, where (i) the state's intermediate appellate court has reached the opposite conclusion in construing the same state statute, (ii) the panel's reasoning is contrary to the canons of statutory interpretation applied by the state's highest court in similar cases; and (iii) the panel could have certified the question of state law to the state's highest court, but declined to do so without explanation?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Miguel Perez and respondent, Z Frank Oldsmobile, were the only parties in the appeal that resulted in the Seventh Circuit decision addressed by this petition. The following additional parties were defendants in the district court proceedings: Moe Pour d/b/a Portage Auto, Jack Sadik, and Jack Bowler.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 223 F.3d 617, and is set forth in the appendix to this petition at A1-A14. The opinion of the district court for the Northern District of Illinois ruling on defendants' motions challenging the jury verdict is reported at 1999 U.S. Dist. Lexis 9462 and is set forth in the appendix to this petition at A15-24.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 2000. Petitioner filed an application for rehearing with suggestion for rehearing *en banc* on August 14, 2000, and these applications were denied on September 25, 2000. *See* A25. On December 15, 2000, the Honorable John Paul Stevens of this Court extended petitioner's time to file a petition for a writ of certiorari to January 16, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pages A26-28 of the Appendix contain the text of the statutory provisions and rules involved in this case, namely the Rules of Decision Act, 28 U.S.C. § 1652, Section 5/3-112.1(e) of the Illinois Vehicle Code, 625 ILCS 5/3-112.1(e), Illinois Supreme Court Rule 20, and Circuit Rule 52 of the Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

This action concerns the method that federal courts should use to determine state law under the Rules of Decision Act when the state's highest court has not squarely addressed the issue presented in a federal action. In this case, the court of appeals declared a new rule of state law based on its independent view of "the best answer" and, in doing so, produced a result that is contrary to the decisions of state intermediate appellate courts and the canons of interpretation used by the state's highest court. Moreover, the court could have, but chose not to, certify the issue directly to the state's high court, but gave no explanation for not using the state's certification procedure.

In the decision below, the Seventh Circuit held that the Illinois statute that provides a specific remedy for odometer fraud bars recovery under state common law for punitive damages based on the same misconduct, even though the statute contains no provision limiting common law remedies. The Circuit Court's construction of state law is contrary to the only Illinois appellate decision that directly addresses the issue. Moreover, the state's highest court has repeatedly held that Illinois law presumes that common law actions are preserved unless a statute unambiguously states that they have been displaced, and the intermediate appellate courts in Illinois have repeatedly affirmed verdicts in which plaintiffs recover under both statutory and common law claims.

The Circuit Court did not identify any state court decision that supports its contrary construction of the odometer statute. Instead, the panel stated that it believed that the recovery of punitive damages should be eliminated to avoid excessive deterrence of "the underlying economic activity," and because the legislature did not enact "a savings clause for tort remedies." Appendix at A10-11. The Circuit Court adopted this novel view of state law even though the defendants had not argued that the statute displaced the state's common law and the

parties had not briefed the question. The panel did not give any justification for not certifying the issue to the state's highest court for resolution, even when petitioner urged certification in a petition for rehearing.

A. *Remedies for Odometer Fraud*

Approximately ten percent of all used cars have odometers that have been rolled back or disconnected.[1] The sale or rental of automobiles with fraudulent odometer readings costs consumers approximately four billion dollars a year.[2] Odometer fraud continues to be widespread despite a federal statute, enacted in 1972, which prohibits tampering with odometers. 49 U.S.C. §§ 32701-11.[3] That statute provides criminal and civil penalties, and creates a private right of action under which a person who misrepresents odometer mileage is "liable for 3 times the actual damages or $1,500, whichever is greater." *Id.* § 32710. The statute expressly provides that it does not affect state laws on "disconnecting, altering, or tampering with an odometer with intent to defraud" as long as those laws are not inconsistent with the federal act. *Id.* § 32711.

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[1] S. Rep. No. 47, 99th Cong. 1st Sess, *reprinted in*, 1986 U.S.C.C.A.N. 5621; CNW Marketing Research, LTR[Lease Trak Reports]/8+, Vol. 13, No. 3 (July 2000).

[2] 53 Fed. Reg. 29,464, 29,476 (Aug. 5, 1988) (National Highway Traffic and Safety Administration estimates odometer fraud costs consumers between $3.3 billion and $4.1 billion annually); CNW Marketing Research, *supra* (July 2000 study estimates cost of fraud at $3.5-5.2 billion).

[3] Prior to 1994, these provision were codified at 15 U.S.C. §§ 1981-91.

Over half of the states, including Illinois, have enacted similar remedies for odometer tampering.[4] The Illinois statute, enacted in 1986, provides a civil action for the same recovery that is available under the federal act where a person "knew or had reason to know" that the odometer has been altered and sells the vehicle with intent to defraud. 625 ILCS 5/3-112.1(e). Any recovery under the state statute is offset by the recovery under the federal statute so that double compensation under both statutes is precluded. *Id.* Establishing liability under the Illinois statute is not as difficult as proving the elements of a punitive damages claim based on common law fraud. Actual knowledge that the odometer reading is false is not required under the statute. Rather, defendants are liable for acting carelessly or with reckless disregard for the odometer law's disclosure obligations.[5]

The Illinois courts have consistently ruled that where "a new remedy is given by statute, and there are no negative words

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[4] JONATHAN SHELDON, ET AL., AUTOMOBILE FRAUD § 5.1 and Appendix C (National Consumer Law Center 1998).

[5] *Ray Kim Ford, Inc. v. Daoud*, 750 F. Supp. 327 (N.D. Ill. 1990); *Buechin v. Ogden Chrysler Plymouth, Inc.*, 159 Ill. App. 3d 237, 111 Ill. Dec. 35, 511 N.E. 2d 1330, 1340 (2d Dist. 1987). In addition, while the burden of proof for common law fraud requires "clear and convincing evidence," only a preponderance of the evidence is needed to recover under consumer statutes. *Compare Tague v. Molitor Motor Company*, 139 Ill.App. 3d 313, 487 N.E.2d 436, 438 (5th Dist. 1985) (six elements of common law fraud must be proven by clear and convincing evidence), *with Landrum v. Gooddard*, 921 F.2d 61 (5th Cir. 1991) (burden of proof under the federal odometer act is preponderance of the evidence, not clear and convincing); *see also Cuculich v. Thomson Consumer Electronics, Inc.*, No. 1-99-1672, 2000 WL 1644435 (Ill. App. 1st Dist. 2000) (burden of proof under Illinois Consumer Fraud Act is preponderance of the evidence).

or other provisions rendering it exclusive," the statute does not displace common law liability, but creates a "cumulative" remedy that allows recovery under both the statute and common law. *Kosicki v. S.A. Healy Co.*, 380 Ill. 298, 44 N.E.2d 27, 29 (1942); *see also infra* at 13-15 (citing additional cases). Only one reported Illinois decision specifically addresses the relationship between the Illinois odometer act and common law liability. In that decision, the intermediate appellate court concluded that nothing in the Illinois odometer law "indicates any intention to preempt preexisting causes of action for common-law fraud," although a plaintiff cannot recover punitive damages on top of statutory treble damages. *Verdonck v. Les Scopes*, 226 Ill. App.3d 484, 491, 590 N.E. 2d 545, 550 (2d Dist. 1992). Other reported Illinois appellate decisions have approved verdicts for plaintiffs on both statutory and common law claims without any indication that the court or any party was concerned that the state's statutory remedies preempted common law liability for odometer fraud. *See infra* at 12.

B. *The Decision Below.*

In 1993, plaintiff/petitioner Miguel Perez went to Z Frank asking to buy a low mileage automobile with only one prior owner. Z Frank convinced Mr. Perez to purchase a 1990 Oldsmobile Cutlass Supreme that cost more than he wanted to pay by representing to Mr. Perez that the car had only one prior owner who had driven the car about 28,000 miles. Mr. Perez later discovered that the car actually had seven prior owners, one of which was a car rental agency, and that the odometer had been rolled back to conceal that the car had actually been driven over 100,000 miles. A19.

Petitioner brought this action in the United States District Court for the Northern District of Illinois alleging common law fraud and claims under various consumer protection statutes. *See* A16. The district court had jurisdiction over petitioner's claim under the federal odometer statute, 49 U.S.C. § 32710(b),

other federal consumer protection laws under 28 U.S.C. § 1331, and had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

The district court submitted petitioner's claims under the odometer statutes and common law fraud to the jury. A16. The jury returned a verdict awarding petitioner compensatory damages of $54,500, which the trial judge reduced to $11,500. The jury also returned a special verdict in which it concluded that punitive damages were warranted because Z Frank misstated the mileage "with the intent to defraud plaintiff." A4. The jury awarded $550,000 in punitive damages, from which the trial judge deducted the treble damages to which the petitioner is entitled under the federal and state odometer statutes. A24. The district court also entered judgment for petitioner as the trier of fact under the Illinois Consumer Fraud Act. A23.

Z Frank challenged the punitive damage award in a post trial motion, but the district court found that the award was justified under Illinois law. The jury's award was not inconsistent with the "enormity of the wrong" because there was evidence that "Z Frank must have known the actual mileage and pedigree of the car in question," and had even "received notification that the car's odometer had been rolled back, yet it took no steps to notify Perez." A21. Nevertheless, Z Frank "refused to refund Perez's money." *Id.* Moreover, the evidence before the jury also showed that "odometer roll backs are a nationwide problem and [sic] needs to be deterred." *Id.*

Z Frank appealed to the Seventh Circuit where it argued, among other things, that the punitive damage award was so grossly excessive that it violated due process, relying on *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Z Frank did not argue that the Illinois statute limited common law punitive damages claims, and the parties never briefed the issue. The panel did not reach the due process issue because it ruled, of its own initiative, that the Illinois odometer statute

makes the greater of the treble damages or $1,500 the maximum that a plaintiff can recover for misrepresentations about mileage. A11-12. Because the panel construed the Illinois statute to preempt common law remedies, it declined to rule on whether the federal odometer statute did so. *Id.*[6]

In reaching this result, the panel opinion, written by Judge Easterbrook, did not cite any Illinois precedent as the basis for its construction of the state statute. The panel acknowledged

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[6] The panel acknowledged that the only federal appellate court decision to address the issue had concluded that the treble damage remedy in the federal odometer statute does not limit punitive damages under state law. *See* A11 (*citing Edgar v. Fred Jones Lincoln-Mercury of Oklahoma City, Inc.*, 524 F.2d 162 (10th Cir. 1975)). The panel's opinion states that "more recent decisions have drawn its methodology into question," *id.*, but the two precedents cited for this conclusion are inapposite. The first decision cited, *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000), dealt solely with the question of whether a federal standard that was designed to allow manufacturers to phase in air bags and employ a mix of technologies preempted state tort claims based on the premise that all automobiles manufactured during the phase-in period should have included air bags, a question that is not relevant to the holding in *Edgar* that the treble damage remedy in the federal odometer statute does not preempt state common law. The second decision, *Rice v. Gustavel*, 891 F.2d 594, 597 (6th Cir. 1989), rejected the plaintiff's argument that a plaintiff could stack state common law fraud and treble damages under the federal odometer statute, but it did not hold that the federal statute preempted common law remedies, or that the statute limits punitive damages to the treble damages available under the statute. Because the Seventh Circuit Court declined to reach the issue of whether the federal odometer statute limits recovery under state law, *Edgar* remains the sole federal appellate decision on this issue. State courts have also held that the federal statute does not preempt common law claims. *See Wildstein, v. Tru Motors, Inc.*, 227 N.J. Super. 331, 335, 547 A.2d 340 (N.J. Super. 1988); *Bill Terry's Inc. v. Atlantic Motor Sales*, 409 So.2d 507, 509 (Fla.App.Ct.1982).

that an intermediate Illinois appellate court had stated that the Illinois odometer statute does *not* eliminate common law punitive damages (*Verdonck v. Les Scopes*), but dismissed that precedent because "the litigants did not present the issue for decision." A10-11. Instead, the panel concluded that economic considerations identified earlier in its opinion indicate that "the best answer to this question" is that the Illinois statute eliminates the ability to collect punitive damages. A11. The decision discusses concerns of economic theorists that excessive punitive damage awards "tend to discourage participation in the underlying economic activity," and that "[o]ne problem with an excessive penalty is that it attracts too many enforcers, who pursue private riches." A7. The panel's views on deterrence and over-enforcement, however, are not tied to any Illinois precedents or statutory directives.

The panel also asserted that the state legislature "could have written that treble damages are just a minimum, preserving all common-law remedies," but because the Illinois statute does not contain such a "savings clause," the statute should be construed as eliminating common law liability. A11-12. The panel did not identify any decision of the Illinois Supreme Court or other Illinois tribunal that supported the conclusion that Illinois statutes preempt common law recovery unless there is a savings clause. Moreover, the panel did not discuss the Illinois precedents stating that statutory remedies do not displace common law liability.

Based on its new construction of Illinois law, the panel remanded for a new trial limited to determining punitive damages for Z Frank's representations on matters *other than the mileage*, such as Z Frank's representation that there had been only one prior owner and that the car was in good condition. A12. However, the panel stated that the trial judge should ensure that any punitive award on these misrepresentations is limited by the treble damages provision of the Illinois odometer law. *Id.*

The panel chose not to certify the issue of whether the odometer statute restricts common law liability to the Illinois Supreme Court. *See* Ill. Sup. Ct. Rule 20. The panel's opinion gives no reason for not issuing a certification order. In petitioner's motion for rehearing, petitioner argued that the court should certify the question rather than reject punitive damage claims that had been allowed by the intermediate appellate courts in Illinois. The petition for rehearing and suggestion for rehearing *en banc* were subsequently denied without explaining why the court had declined to certify the issue. A25.[7]

REASONS FOR GRANTING THE WRIT

THE RULING BELOW IS INCONSISTENT WITH THIS COURT'S DECISIONS BECAUSE THE SEVENTH CIRCUIT SUBSTITUTED ITS OWN JUDGMENT REGARDING WHAT STATE LAW SHOULD BE, RATHER THAN APPLYING STATE LAW REFLECTED IN THE DECISIONS OF THE STATE'S COURTS OR CERTIFYING THE QUESTION TO THE STATE'S HIGHEST COURT.

The Rules of Decision Act, 28 U.S.C. § 1652, and the decisions of this Court make clear that, when federal courts adjudicate claims governed by state law, they must not apply their own views regarding the best rule, but must apply the law declared by the state courts. *Fidelity Union Trust Co. v. Field*,

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[7] Along with the petition for rehearing, petitioner submitted the affidavit of the Illinois legislator who sponsored the Illinois odometer legislation, Rep. Charles Hartke. Mr. Hartke's affidavit stated that the odometer statute was not intended to restrict state common law remedies. The panel refused to consider this affidavit. The panel did not identify, in its opinion or order denying rehearing, any legislative history that supported its novel construction of the odometer statute.

311 U.S. 169, 178 (1940). "[I]t is the duty of the [federal courts] in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law.'" *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940). This rule is equally applicable where the issue is "the construction and effect of a state statute." *Fidelity Union Trust Co.*, 311 U.S. at 178. In such cases, a federal court is "not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute." *Id.* Moreover, where the state has adopted rules that allow a federal court to obtain an authoritative answer to unsettled questions of state law, the federal courts should certify the question to the state court rather than decide the issue based on their own speculation about what the state court would decide. *Arizonans For Official English v. Arizona*, 520 U.S. 43, 76-77 (1997).

In this case, the Seventh Circuit "so far departed from the accepted and usual course of [the] judicial" method of determining state law "as to call for the exercise of this Court's supervisory power." Sup. Ct. Rule 10(a). In an affront to Illinois law and the Illinois courts, the Seventh Circuit based its ruling on the panel's own assessment of "the best answer" without regard to the state's law. To support its conclusion, the panel cited certain economic theories regarding punitive damages and its own method of construing statutes, but did not identify any Illinois precedents that supported its approach. The panel's method for determining state law effectively resurrects the discredited doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1942), under which federal courts had free rein to disregard state court decisions and apply the best rule of law, as they see it. But this Court's decisions following *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), make clear that there is no "general law" and that federal courts are not "free to exercise an

independent judgment as to what" the law of the state "should be" based on their own preferences for certain principles or policies. *Id.* at 71. Rather, federal courts must base their reasoning and conclusions on the rulings of the state's courts, even if they disagree with them. Three considerations demonstrate that the Seventh Circuit failed to do so here:

First, the Seventh Circuit's decision is directly contrary to the only state court decisions that address the relationship between the Illinois odometer statute and common law punitive damage claims. Under this Court's rulings, the Circuit was required to follow these intermediate appellate court decisions because there is no contrary Illinois authority, and no evidence that the state's highest court would reject these appellate rulings. As this Court has stated, "a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable." *West v. AT&T*, 311 U.S. at 236-37. To the contrary, statements by intermediate appellate courts concerning state law must be followed by a federal court "unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.* 237; *accord Fidelity Union Trust Co. v. Field*, 311 U.S. at 177-78; *Hicks v. Feiock*, 485 U.S. 624, 629-30 (1988) (intermediate appellate court ruling on question of state law not reviewed by highest court is controlling on federal court); *California v. Taylor*, 353 U.S. 553, 556-57 n.2 (1957) (same).

The Illinois appellate court discussed whether the Illinois odometer statute limited common law remedies in *Verdonck v. Les Scopes*, and concluded:

> The Federal Act does not preempt causes of action for common-law fraud based on odometer tampering or misrepresentation. The Illinois odometer law is patterned on the Federal Act, and nothing in that statute indicates an intention to preempt preexisting

> causes of action for common-law fraud. In any event, defendant has not argued that either statute preempts common-law fraud actions. The proper remedy here is to award plaintiff his actual damages plus the punitive damages, as the total award here is larger than the treble damages under the Federal Act.

590 N.E. 2d at 550 (citations omitted); *accord Majcher v. Laurel Motors, Inc.*, 287 Ill.App.3d 719, 680 N.E.2d 416, 429 (2d Dist. 1997). Although there are no other reported Illinois decisions that explicitly address whether the Illinois odometer statute preempts common law remedies, the Illinois appellate courts have uniformly allowed consumers to sue for misrepresentations under both common-law fraud and consumer protection statutes, *see, e.g., Beuchin v. Ogden Chrysler-Plymouth, Inc.*, 159 Ill.App.3d 237, 511 N.E.2d 1330, 1338-40 (2d Dist. 1987); *Tague v. Molitor Motor Company*, 139 Ill.App. 3d 313, 487 N.E.2d 436, 439 (5th Dist. 1985), and have affirmed verdicts awarding both statutory treble damages and punitive damages for common law fraud. *Ciampi v. Ogden Chrysler Plymouth, Inc.*, 262 Ill.App. 3d 94, 634 N.E.2d 448, 461-62 (2d Dist. 1994).

There is no "persuasive data" for rejecting these precedents. Indeed, the Seventh Circuit did not identify *any* decision of the state's highest court that would support rejecting the Illinois precedents, but based its decision entirely on the panel's preference for limiting the use of punitive damages to penalize wrongdoing and the absence of a "savings clause" in the statute.

Thus, the decision below is inconsistent with the rules set forth by this Court in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, in which the Court reversed a federal appellate court because it declined to follow decisions of the state chancery court ruling that a state statute did not alter preexisting state trust law. In determining the proper construction of a state statute, a federal court must look to the "construction and effect

which the State itself accorded to its statute," which is "shown by the judicial action through which the State interprets and applies its legislation." *Id.* at 178. Under *Fidelity Union*, the Seventh Circuit was "not at liberty to reject" the state court decisions construing the state statute "merely because it did not agree with their reasoning." *Id.* at 179.

Second, the Seventh Circuit did not examine the decisions of the state's highest court, but had it done so it would have found that those decisions support the conclusion that the Illinois statute does *not* limit common law liability. The Seventh Circuit's ruling not only ignores these state supreme court precedents; it creates a rule that is directly contrary to Illinois' interpretive canons. The panel asserted that the statute eliminated common law remedies because the state legislature did not include a "savings clause" stating that "common-law claims are unaffected." A11. But state court decisions make clear that Illinois applies the opposite presumption: when a statute creates new remedies, common law remedies for the same injury remain intact unless a statute specifically precludes such common law remedies.

For example, in *Kosicki v. S.A. Healy Co.*, 44 N.E. 2d at 29, the Illinois Supreme Court held that a statutory remedy for property owners injured by municipal construction did not displace the common law liability for the same conduct because where "a new remedy is given by statute, and there are no negative words or other provisions rendering it exclusive, it will be deemed cumulative only and not to take away prior remedies." 44 N.E.2d at 29. In *Nottage v. Jeka*, 172 Ill.2d 386, 667 N.E.2d 91, 217 Ill. Dec. 298 (1996), the Court cited the same rule when it held that a state statute establishing a procedure for recovering attorneys fees in domestic relations cases did not preempt a common law action for contract damages because "[n]othing in the statutory language suggests that the legislature also intended to eliminate common law actions for fees." *Id.* at 94. In short, Illinois law provides that

"[a] legislative intent to abrogate the common law must be clearly and plainly expressed, and such an intent will not be presumed from ambiguous or doubtful language." *Maksimovic v. Tsogalis*, 177 Ill.2d 511, 687 N.E.2d 21, 24, 227 Ill. Dec. 98 (1997); *accord Elkin v. Diversey Trust & Savings Bank*, 363 Ill. 160, 163, 1 N.E.2d 844, 845 (1936) (holding that statute creating new remedy does not abrogate preexisting common law remedies); *Sawko v. Dominion Plaza One Condominium Ass'n*, 161 Ill. Dec. 263, 578 N.E. 2d 621, 624-25, 218 Ill. App.3d 521 (2nd Dist. 1991) (same); *Skilling v. Skilling*, 59 Ill. Dec. 937, 432 N.E.2d 881, 887, 104 Ill. App. 3d 213 (1st Dist. 1982) (same); *Schwartz v. City of Chicago*, 21 Ill. App. 3d 84, 315 N.E. 2d 215, 223 (3d Dist. 1974) (same).[8]

The Illinois Supreme Court has applied this canon to interpret the relationship between statutory treble damage remedies and common law punitive damages. In *Harris v. Manor Health Care Corp.*, 111 Ill. 2d 350; 489 N.E.2d 1374, 95 Ill. Dec. 510 (1986), the Court addressed a constitutional challenge to a state consumer protection statute, the "Nursing Home Care Reform Act," which provided for a treble damage recovery against nursing home care providers for conduct that gives rise to punitive damage liability under the common law. The defendant in *Harris* argued that the statute was unconstitutional because it authorized recovery of both common-law punitive damages and treble damages. The Court rejected the constitutional challenge, and concluded that a plaintiff "can recover either treble damages under the Act or common law punitive damages, but not both." 489 N.E.2d at 1381. In doing so, the Court observed, "'[t]he well established rule ... is that where a statute gives a new remedy and contains no negative, express or implied, of the remedy which previously

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[8] This Court has applied the same principle in construing federal statutes. *See Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 412 (1969).

existed, the new remedy is to be regarded as cumulative and not exclusive *and a party may elect as between the two.'* (Emphasis added.)" 489 N.E.2d at 1380 (quoting *Decker vs. Domoney*, 387 Ill. 524, 528-28, 56 N.E.2d 750, 753 (1944)).

The Seventh Circuit's novel approach to interpretation of Illinois statutes is particularly troublesome because of the burden it places on the state legislature. Under the Circuit's ruling, in order to preserve common law remedies for litigants with claims in federal court, the legislature must affirmatively enact "savings clauses," even though Illinois' own courts have ruled that such savings clauses are not required to preserve common law remedies in state courts. In addition, the ruling will result in the very disparity that the Rules of Decision Act is intended to prevent. The Act recognizes that "[i]t is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts." *Fidelity Union Trust*, 311 U.S. at 180. The Seventh Circuit's ruling does just that. It creates diametrically opposite rules by providing common law claims are foreclosed for litigants in federal court unless there is a savings clause, while the Illinois courts have held that such claims are automatically preserved unless the legislature adds specific language eliminating the common law remedy.

Third, the Seventh Circuit panel inexplicably arrogated the authority to create an unprecedented rule of state law when it could have certified the issue to the Illinois Supreme Court for authoritative resolution. *See* Ill. Sup. Ct. Rule 20; 7th Cir. Rule 52. Where, as here, "the state courts stand willing to address questions of state law on certification," it is "gratuitous" for a federal court to decline to certify and, instead, announce a novel rule of state law based on its own speculation. ***Brockett v. Spokane Arcades, Inc.***, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring).

In considering whether to certify, the federal court must recognize that, in the long run, certification will "save time, energy, and resources and helps build a cooperative judicial federalism," because the federal court will not be substituting its own conjecture for the authoritative judgment of the state's highest court. *Arizonans For Official English v. Arizona*, 520 U.S. at 77. Although certification is not obligatory, a court's decision not to certify must show that the court exercised "sound discretion," including respect for the state's decision to create a special procedure so that state law issues that arise in federal actions may be decided by state, rather than federal, judges. *Lehman Brothers v. Schein*, 416 U.S. 386, 390-91 (1974). Accordingly, in *Lehman Brothers v. Schein*, this Court vacated a decision in which the circuit court had inexplicably decided the state law issue instead of certifying the question, and remanded the case for the court to "reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court." *Id.* at 391-92.

The Seventh Circuit's failure to certify in this case does not reflect "sound discretion" or proper respect for the authority of state law because it is both unexplained and inexplicable. First, the panel did not give any reason for declining to certify this issue in its decision, or in its order denying rehearing. Indeed, the argument that the odometer law preempted common law recovery was not introduced by the parties, but was adopted by the panel *sua sponte*, without the benefit of any briefing by the parties. The panel wholly ignored the principle that courts should not decide issues that have not been raised or examined through the adversary process. *See Sims v. Apfel*, 120 S.Ct. 2080, 2084-85 (2000); *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance... distinguishes our adversary system of Justice from the inquisitorial one."). Moreover, because the issue was never raised before the panel's decision,

the first opportunity to urge that the issue be certified was petitioner's motion for rehearing, which the panel denied without ever addressing the issue of certification. Thus, although the panel was not required to address this novel issue at all, it adopted an unprecedented construction of a state statute without seeking the views of the parties or the state's highest court, and never explained why it considered it inappropriate to consider either.

Second, the panel could not have decided that certification was unnecessary because Illinois precedent supported the panel's construction of the statute. The panel acknowledged that "Illinois has never squarely faced" the question it decided and it did not identify *any* Illinois precedents supporting its ruling. A11. Indeed, the panel disregarded the only Illinois decisions that address the issue. *See id.*

Incidently, the panel also did not, and could not, point to authority in any other state that supports its unprecedented construction of the odometer statute. Although every state except Alabama has a specific statute addressing odometer tampering, and over half of the state statutes provide private civil remedies similar to that of Illinois, the Seventh Circuit did not point to any decisions, and we are not aware of any decisions, that conclude that such a state statute implicitly restricts common law punitive damage remedies.

Third, the panel could not have justified failing to certify on the ground it wanted to avoid delay or additional costs. Under the panel's resolution of the statutory issue, the case must be remanded for a new trial and reexamination of attorneys fees. *See* A12-13. If the Illinois Supreme Court determined that the odometer statute did not eliminate common law remedies, these further proceedings would be unnecessary.

Thus, the Seventh Circuit's unexplained decision not to certify is not justified by any consideration of state law or judicial management. Rather than allow the Illinois court to

resolve the state law issue, the panel prescribed its own view of "the best answer to the question." A11. This presumptive imposition of the federal court's judgment on issues of state law so far departs from the directives of this Court concerning federal courts' obligations to respect state law under the Rules of Decision Act as to call for the exercise of this Court's supervisory power. Sup. Ct. Rule 10(a).

CONCLUSION

The petition for a writ of certiorari should be granted to review whether the Seventh Circuit took the proper steps to ascertain Illinois law before it, *sua sponte*, declared its construction of the Illinois statute.

Respectfully submitted,

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January 16, 2001

APPENDIX

Appendix

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[223 F.3d 617]

In the United States Court of Appeals
For the Seventh Circuit

Nos. 99-2742, 99-2854, 00-1701 & 00-1786

Miguel Perez,

Plaintiff-Appellee, Cross-Appellant,

v.

Z Frank Oldsmobile, Inc.,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97 C 8950--Harry D. Leinenweber, Judge.

Argued June 1, 2000--Decided July 31, 2000

Before BAUER, EASTERBROOK, and MANION, Circuit Judges.

EASTERBROOK, *Circuit Judge.* This $8,000 dispute about a used car has led to an $800,000 judgment against Z Frank Oldsmobile. Punitive damages exceeding $500,000 and attorneys' fees near $240,000 make up the bulk of the award. These damages are at least an order of magnitude too high, and final decision about attorneys' fees must abide the outcome on remand.

Jack Bowler bought a new car from Z Frank in 1993, trading in his 1990 Oldsmobile Cutlass Supreme. The odometer showed about 28,000 miles. Z Frank resold the car to Miguel

Perez, who had asked to buy a single-owner, low mileage auto. Perez drove the Oldsmobile some 50,000 miles through 1997. When he offered it in trade to a different dealer, however, he learned that the odometer was incorrect. By tracing the chain of title back with the aid of state authorities, Perez learned that he had been the car's eighth owner and that Moe Pour (the fourth owner, doing business as Portage Auto Sales) had rolled the odometer back roughly 70,000 miles.

Perez sued Z Frank and Pour under 49 U.S.C. § 32710(b), which creates jurisdiction to enforce the Motor Vehicle Information and Cost Savings Act of 1972, recodified in 1994 as Chapter 327 of Title 49. Section 32703 prohibits odometer tampering. Z Frank did not violate §32703, but §32705(a) required it either to disclose the Oldsmobile's true mileage or confess inability to determine that mileage, and Z Frank did neither. Perez believes that Z Frank should have figured out from General Motors' warranty records, which maintenance workers accessed by computer, that a rollback had occurred. This supported a claim under §32710(a):

> A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is greater.

Illinois has an essentially identical provision, 625 ILCS 5/3-112.1(e)(1), adding that "[a]ny recovery . . . under this Section shall be offset by any recovery made pursuant to the federal Motor Vehicle Information and Cost [sic] Act of 1972." 625 ILCS 5/3-112.1(e). Both federal and state statutes provide that violators must reimburse prevailing plaintiffs' legal expenses. Perez also sought to recover damages under state tort law.

Perez paid Z Frank $11,000 for the car. A jury's special verdict establishes that the difference between fair market value of the car, given its actual mileage, and the actual purchase price was $7,900. The jury also assessed damages of $3,000 for repairs required by the car's extra mileage, $10,000 for loss of use while the car was being repaired, $3,600 for finance charges on the loan Perez took out to buy the car, and $30,000 for "aggravation, humiliation, or inconvenience", for total compensatory damages of $54,500. In post-judgment motions the district judge chopped the compensatory award down to $11,500, stating that the evidence did not establish that the difference in mileage caused the losses of which Perez complains. 1999 U.S. Dist. Lexis 9462 at *4-5 (N.D. Ill. June 10, 1999). Perez appeals, contending that the jury's figure was justified, but we think that any error runs in Perez's favor. The $7,900 difference between the $11,000 market value of a car with 28,000 miles (as Perez supposed) and the $3,100 value of a car with about 100,000 miles (the actual figure) reflects elements such as anticipated repair costs and diminished use. That's why a high-mileage car sells for less than a low-mileage car. To allow cumulative awards for the difference in market value, and repairs, and loss of use, and "inconvenience," is quadruple counting. *Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955 (7th Cir. 1998). See also *Haluschak v. Dodge City of Wauwatosa, Inc.*, 909 F.2d 254 (7th Cir. 1990) (describing damages of $7,500 before trebling in another odometer case as excessive). Even if Z Frank sold Perez a hunk of scrap with no engine and square wheels, the loss could not logically exceed the purchase price less salvage value, for Perez could sell it to a junk yard and buy a functioning car. As for the finance charge: a buyer's loss does not depend on how much of the purchase price was borrowed or how long it took to repay the loan. To evaluate economic loss correctly, the court should add prejudgment interest on the overpayment (here $7,900) from the

time of sale, using the rate at which the judgment debtor pays for capital. See *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-33 (7th Cir. 1992). The buyer loses the use of this money and should be compensated for its time value whether he buys the car with cash or on credit. But Perez does not seek prejudgment interest, and Z Frank does not contend that $11,500 is too high, so we leave the compensatory damages as the district judge set them.

In separate answers, the jury concluded that Z Frank misstated the mileage "with the intent to defraud plaintiff" and that a punitive award is warranted. The jury assessed $550,000 in punitive damages against Z Frank. The "intent to defraud" finding required trebling of the award for the odometer rollback. The judge deducted the entire treble-damages award of $34,500 from the punitive award, cutting it to $515,500. Thus the total judgment against Z Frank after all post-trial motions was $550,000: $11,500 in compensatory damages, $23,000 (double this) to achieve trebling under the odometer statutes, and $515,500 in punitive damages. Perez correctly observes that the district court committed a logical error in this process. It reduced the punitive award because Illinois law forbids cumulative damages multipliers and punitive damages for a single wrong. See, e.g., *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 366, 489 N.E.2d 1374, 1381 (1986); *Verdonck v. Scopes*, 226 Ill. App. 3d 484, 491, 590 N.E.2d 545, 550 (2d Dist. 1992). The district judge therefore should have reduced the punitive award by $23,000, to $527,000, rather than by the full odometer award after trebling. The total then would have been $561,500 rather than $550,000. But for reasons yet to come the award must be reduced rather than increased.

Z Frank's claims of trial error are unpersuasive and do not require discussion. As for the sufficiency of the evidence: Pour rather than Z Frank did the tampering, and it is not clear that

anyone at Z Frank lied to Perez; the most one could say is that the sales staff should have known what the maintenance staff either knew or should have deduced from GM's database. Still, Z Frank the corporation "knew" what its maintenance workers knew, and it did not have in place any procedures to disseminate this information, though managers must have appreciated that failure to communicate could lead its sales force to misrepresent matters on occasion. Because Z Frank does not contest the jury's conclusion that it misstated the mileage "with the intent to defraud", we need not pursue the question whether any person (or the corporate entity) acted with that mental state. Cf. *Farmer v. Brennan*, 511 U.S. 825 (1994). Frauds often escape detection, and the need to augment deterrence of concealable offenses is a principal justification of punitive damages. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998); Richard Craswell, *Deterrence and Damages: The Multiplier Principle and its Alternatives*, 97 Mich. L. Rev. 2185 (1999).

Although a damages multiplier of some kind is in order, what is the right multiple? Optimal deterrence is achieved when damages equal the harm done by the wrong, divided by the probability of detecting the injury and prosecuting the claim. This is an application of Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968), a theory of sanctions that played a role in his receipt of a Nobel Prize in 1992. For example, if a wrong causes $5,000 injury and is redressed one time in five, the optimal damages are $25,000. That redresses the injury to victims as a whole, and the injurer then can decide what precautions are appropriate. (A firm such as Z Frank must work out, for example, how much to spend investigating the history of the used cars it receives and coordinating the operations of its sales and maintenance staffs.) For a more complete explanation applied to punitive damages, see Keith N. Hylton, *Punitive Damages and the Economic*

Theory of Penalties, 87 Geo. L.J. 421 (1998). The punitive award even as reduced by the judge is 45 times compensatory damages (and 65 times the difference in market price, the best measure of both the customer's loss and the dealer's gain). Are odometer rollbacks detected that infrequently? When it is so hard to be certain, it is appropriate to rely on rules of thumb. Both the state and federal odometer statutes supply such a rule: treble damages. Both say that the wrongdoer "is liable for 3 times the actual damages or $1,500, whichever is greater." They do not say something like "3 times the actual damages, or $1,500, or any other multiplier the jury prefers, whichever is greatest."

When a federal statute provides for treble damages (or some other multiplier), judges regularly conclude that punitive damages may not be added. Congress has specified the multiplier, which judges and juries alike must respect. Thus, for example, *Shea v. Galaxie Lumber & Construction Co.*, 152 F.3d 729, 734 (7th Cir. 1998), holds that punitive damages may not be added to the statutory double damages for wilful violations of wages and hours requirements under the Fair Labor Standards Act. We have concluded that the anti-retaliation section of the FLSA does permit punitive damages, because retaliation claims are not covered by the double-damages rule, *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108 (7th Cir. 1990), but that decision has been controversial; other circuits have held that because some portions of the FLSA provide for multipliers, punitive awards are impermissible across the board. E.g., *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000). No court believes that punitive damages may be awarded for antitrust violations, the best known of the federal treble-damages statutes, although some kinds of antitrust violations are concealable. See *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1331-32 (10th Cir. 1996) (holding that punitive

damages may not be awarded for violations of federal antitrust laws). Indeed, no case of which we are aware holds that, when Congress specifies a damages multiplier, the jury may select a different and higher multiplier by awarding punitive damages under federal law.

When denying Z Frank's motion to reduce the punitive award, the district judge wrote that "odometer roll backs are a nationwide problem [that] needs to be deterred. Both the state of Illinois and the United States have seen fit to enact statutes to deal with this problem. An award of punitive damages such as the one awarded by the jury in this case will not fall on deaf ears. Automobile agencies who would not be scared off by a small award of compensatory damages, even if the award is trebled, will undoubtedly be scared off by this award of over one-half million dollars." 1999 U.S. Dist. Lexis 9462 at *11. Indeed they will be "scared off" by awards 40 or more times the loss (and, in this case, 65 times the profit from the wrong). They may be scared right out of the used-car business. Excessive awards tend to discourage participation in the underlying economic activity, for some level of error by employees is a risk of doing business. Auto dealers also would be terrified by the prospect of a judge ordering the Army to drive an M1-A1 main battle tank through their showrooms, flattening their inventory. High penalties deter more, but this is not to say that higher always is better. One problem with an excessive penalty is that it attracts too many enforcers, who pursue private riches. This concern has led to proposals to decouple damages from recovery, so that the defendant pays more than the plaintiff receives, with the difference going to the public fisc. E.g., Marcel Kahan & Bruce Tuckman, *Special Levies on Punitive Damages: Decoupling, Agency Problems, and Litigation Expenditures*, 15 Int'l Rev. L. & Econ. 175 (1995). Section 32710 does not take that approach, however, nor does it say that more is always better. Congress decided that the right

penalty is trebling, with a minimum of $1,500 to ensure some sting even when the harm is slight. The district judge, like the jury, obviously believed this inadequate. But disagreement with an Act of Congress is not a good reason to amerce a defendant.

Adequacy of deterrence cannot be evaluated by limiting attention to private awards. Section 32709 authorizes both civil suits and criminal prosecutions by the United States, plus civil suits by states. Section 32709(a) is particularly telling. It permits the United States to enforce the odometer-tampering rules by civil suits for damages and prescribes "a civil penalty of not more than $2,000 for each violation. A separate violation occurs for each motor vehicle or device involved in the violation. The maximum penalty under this subsection for a related series of violations is $100,000." Rolling back the odometer (or lying about the mileage) on one car can support no more than a $2,000 penalty; for 25 cars the penalty is $50,000 at most; and the maximum penalty for more than 50 cars is $100,000. What sense could it make to have a statutory cap of $100,000 on the civil penalty for 50 or more violations yet allow a jury to impose a $550,000 penalty for a single violation? Punitive damages are a form of civil penalty, going to a victim rather than the public but serving the same function. Section 32709 demonstrates that for violations of this statute the sky is not the limit. A victim is entitled to treble damages, and the maximum civil penalty on top of trebling is $2,000 per car, plus criminal penalties under §32709(b) for really severe infractions.

If the federal odometer statute does not authorize punitive damages, how about the state odometer statute? The state law is essentially identical to the federal, going out of its way to ensure that plaintiffs do not recover cumulatively under the two laws. When Illinois enacts a twin to a federal law, state judges generally hold that the state law has the same meaning as the federal. *Luken v. Lake Shore & M.S. Ry.*, 248 Ill. 377, 383, 94

N.E. 175, 178 (1911); *Branson v. Department of Revenue*, 168 Ill. 2d 247, 254, 659 N.E.2d 961, 965 (1995). In *Verdonck* the state's appellate court announced this approach to 625 ILCS 5/3-112.1 in particular. 226 Ill. App. 3d at 491, 590 N.E.2d at 550. See also *Buechin v. Ogden Chrysler- Plymouth, Inc.*, 159 Ill. App. 3d 237, 253, 511 N.E.2d 1330, 1339-40 (2d Dist. 1987). Moreover, §3-112.1(e) says that the defendant is liable in an amount equal to the sum of treble damages (or $1,500 if greater) plus attorneys' fees; greater damages cannot be "equal to" the statutory formula. Thus we predict that the Supreme Court of Illinois would hold that punitive damages may not be awarded for violations of 625 ILCS 5/3-112.1.

Perhaps anticipating this conclusion, Perez added claims under the common law of Illinois. Any conduct that violates 625 ILCS 5/3-112.1, Perez insisted, also is common law fraud and therefore supports an award of punitive damages. Perez also contended that Z Frank told other lies--in particular, that the car had only one prior owner and was in good condition. Unfortunately, neither the district judge nor the jury distinguished among potential bases for punitive damages. The jury was not asked, for example, to make separate awards for the mileage misrepresentation and for any other misrepresentations. Indeed, we cannot be certain that the jury found any other misrepresentations. It found that Z Frank violated the odometer statutes with intent to defraud, but its separate verdict with respect to the common-law claim is ambiguous. It answered "yes" to the question:

> Did Z Frank Oldsmobile, Inc. know the false statement or statements of material fact it made in connection with the sale of plaintiff's vehicle were false, or did it make the same statement or statements with a reckless disregard of whether they were true or false?

This not only is a compound question, making a simple "yes" ambiguous, but also fails to specify which "statement or statements" were false. Just the statements about the odometer, or were some other statements false? The question did not permit the jury to find, for example, that Z Frank's statements about mileage were intentionally false, but statements about the condition of the car were negligently false (or even true). A single false statement on any subject would lead to a "yes" answer. Differences in the burden of persuasion further compound matters: the judge instructed the jury that Perez had to establish common-law fraud by clear and convincing evidence, while issues concerning accuracy of the odometer were to be decided by a preponderance of the evidence. Because this question came immediately after the odometer - statute question, the jury may well have concentrated on statements about mileage. That possibility finds support in the jury's punitive awards: $550,000 against each of Pour and Z Frank, although Pour was responsible only for odometer tampering. Perhaps the jury thought Z Frank less responsible than Pour on this account (for Pour rolled back the mileage) and more responsible for other deceits, but exactly offsetting differences would be surprising. Because the verdict is ambiguous, however, we must consider separately the possibility of punitive tort awards for fraud about the odometer and about other matters.

Illinois has never squarely faced the question whether punitive damages may be awarded under the common law when 625 ILCS 5/3-112.1, which does not itself authorize punitive awards, covers the same ground. One appellate decision (*Verdonck*) assumes that the answer is yes, provided that the awards are not cumulative, but the litigants did not present the issue for decision. Cf. *Ciampi v. Ogden Chrysler Plymouth, Inc.*, 262 Ill. App. 3d 94, 634 N.E.2d 448 (2d Dist. 1994). For the reasons we have already given when explaining why punitive

damages are not proper under state and federal odometer statutes, the best answer to this question--and the one we predict that the Supreme Court of Illinois will adopt when it finally considers the issue--is no. What point would the statutes serve if in the end the common law of fraud were the effective authority to award damages? The state's legislature could have said that the award is to be determined under the law of fraud, or it could have written that treble damages are just a minimum, preserving to plaintiffs all common-law remedies. But neither state nor federal law contains a savings clause for tort remedies. Federal law provides that state odometer statutes are not preempted, 49 U.S.C. §32711, but lacks a similar provision for state tort law. The Illinois odometer statute does not say that common-law claims are unaffected. Both statutes provide that the right award is the greater of treble damages or $1,500. Treble damages are a form of punitive damages. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1869-70 (2000); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). The legislative decision to have a multiplier of three is not honored when a court permits a jury to select a different punitive multiplier. Although one federal appellate decision more than a generation old concludes that punitive damages under state common law are compatible with the federal odometer statute, see *Edgar v. Fred Jones Lincoln-Mercury of Oklahoma City, Inc.*, 524 F.2d 162 (10th Cir. 1975), more recent decisions have drawn its methodology into question. E.g., *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000); *Rice v. Gustavel*, 891 F.2d 594, 597 (6th Cir. 1989). But this is not a subject we need pursue, given our conclusion that the Supreme Court of Illinois would treat the state's own odometer law as establishing the maximum award for misrepresentations about mileage.

Punitive awards for the single-owner and good- condition representations would not cover the same ground as the

odometer-tampering statutes, so they cannot be ruled out. But neither can this award be sustained on that ground, given the verdict's ambiguity. We therefore remand for a new trial, limited to Perez's claim that Z Frank committed frauds other than misrepresenting the car's mileage. Compensatory damages have been fixed, so the trial will be limited to liability for frauds other than mileage and, if liability is established, to punitive damages. The judge should tell the jury about the damages for the rollback, so that jurors will not be tempted to confer duplicative recovery, and should ensure that any further punitive recovery is reasonable in relation to the award already made. Illinois (we are confident) would not treble the damages for the more serious misrepresentation concerning mileage yet allow unlimited damages for puffery such as "this car is in good condition."

Even criminal sentencing, once the subject of unbridled discretion by district judges, is now controlled by principles of proportionality. If the United States had prosecuted Z Frank Oldsmobile, Inc., for what it did to Perez, the maximum penalty would have been a fine of $11,500. See U.S.S.G. § 2N3.1(a) (setting an offense level of 6 for a single odometer violation), § 8C2.4(d) (fine of $5,000 for a level 6 offense by an organization, though an increase to the victim's actual loss is authorized by §8C2.4(a)(3)). (We disregard the culpability adjustment under §8C2.5, which cannot be calculated on this record, but for a modestly sized organization such as an auto dealership this adjustment could not substantially increase the fine for a first conviction.) Illinois does not treat violation of 625 ILCS 5/3-112.1 as a crime, so its legislature has not opted for a higher punishment than Congress specified. Punitive damages should not be used as an escape hatch, subject only to the whim of judge and jury.

Although the parties have devoted considerable attention to constitutional limits on punitive damages, see *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), these come into play only after the assessment has been tested against statutory and common-law principles. When the Supreme Court is asked to review a state court's award, the Constitution is the only constraint, for the state judges determine the meaning and application of state law. But when a plaintiff seeks punitive damages in a federal case, it is unnecessary to look for limits in the Constitution. See *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) ("[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law."); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 277-80 (1989). Federal judges may, and should, insist that the award be sensible and justified by a sound theory of deterrence. Random and freakish punitive awards have no place in federal court, and intellectual discipline should be maintained. *Zazú Designs v. L'Oréal, S.A.*, 979 F.2d 499 (7th Cir. 1992); *Kemezy v. Peters*, 79 F.3d 33 (7th Cir. 1996); Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages*, 107 Yale L.J. 2071, 2078-79 (1998). If the award is well justified, then it is also constitutionally sound; and if it is not justified, then a new trial may be awarded using "federal standards developed under Rule 59" (*Browning-Ferris*, 492 U.S. at 279) without resorting to constitutional reasoning.

Because we are remanding for further proceedings, we also vacate the award of attorneys' fees and costs, which should be recalculated in light of the final outcome. Still, two comments are in order.

First, the district court's total award of $236,911, see 2000 U.S. Dist. Lexis 2037 (N.D. Ill. Feb. 18, 2000), is awfully hard to swallow. It represents more than 1,200 hours at $185 per

hour, or about two-thirds of a year's billable time for a hard-working lawyer. How can a case this simple, which required only three trial days and led to a compensatory award of $11,500, have commanded that investment of resources? In *Haluschak*, an odometer case that yielded compensatory damages of $7,500 before trebling, the plaintiffs' legal costs were only $12,560-- and *Haluschak* was tried twice! This question requires careful attention on remand.

Second, the district court assumed that the reasonableness of attorneys' fees must be assessed in relation to the total award, including punitive damages. If either the state or federal odometer statute supported punitive damages, that might be so. Given our holding that any recovery in excess of $34,500 depends on state tort law, however, the award looks unreasonable, for no sensible person spends $236,000 in pursuit of $34,500 (or even $163,500, treble the jury's original compensatory award). See *Cole v. Wodziak*, 169 F.3d 486 (7th Cir. 1999). The state and federal odometer-tampering statutes authorize awards of attorneys' fees only for success in obtaining recoveries under those statutes. Illinois does not provide for fee- shifting in tort cases. Outlays in pursuit of common-law punitive damages therefore must be borne by Perez and may not be shifted to Z Frank. See *Roche v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 235 Ill. App. 3d 70, 86-87, 600 N.E.2d 1218, 1228-29 (2d Dist. 1992).

REVERSED AND REMANDED

[1999 U.S. Dist. Lexis 9462]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Filed June 10, 1999, Docketed June 14, 1999

MIGUEL PEREZ,

Plaintiff, **Case No. 97 C 8950**

v. **Judge Harry D. Leineweber**

Z FRANK OLDSMOBILE, INC., MOE POUR d/b/a PORTAGE AUTO, JACK SADIK, JACK BOWLER,

Defendant.

MEMORANDUM OPINION AND ORDER

Z Frank sold Mr. Perez an automobile that had had its odometer rolled back and had had seven more owners than represented. Because of this Perez sued Z Frank and all others whose names appeared in the chain of title. It appears that the actual roll back was done by a prior owner, Moe Pour doing

business as Portage Auto. Portage Auto failed to appear and was defaulted. Sadik and Bower, other owners in the chain of title were dismissed on summary judgment. Z Frank has maintained a counterclaim against Portage Auto.

Perez' complaint consisted of multiple accounts, but at the end consisted of claims brought under the federal and Illinois odometer roll back statutes *(49 U.S.C. § 32710*(a) and 625 ILCS 5/3-112.1), Magnuson-Moss Act *(15 U.S.C. § 2301,* et seq.) for violation of express and implied warranties, Common law fraud, and the Illinois Consumer Fraud Act. The court directed a verdict against Z Frank on Magnuson-Moss, on liability, and submitted the odometer roll back claim, the common law fraud claim, and the issue of damages to the jury. The Consumer fraud claim was retained by the court for resolution. The jury returned a verdict against Z Frank on all counts and set Perez' actual damages at $ 54,500.00 and punitive damages at $ 550,000.00. The jury itemized the actual damages as follows: (a) $ 7,900.00 representing the difference in market value of the automobile and the price Perez paid for it; (b) $ 3,000.00 of the reasonable costs of repairs, maintenance and towing sustained by Perez; (c) $ 10,000.00 representing the value of the loss of use of the vehicle; (d) $ 3,600.00 for the finance charges Perez incurred as a result of the sale; and (e) $ 30,000.00 representing Perez' "aggravation, humiliation or inconvenience."

Z Frank has now brought post trial motions, pursuant to Rule 50(b)(1)(C), seeking to knock out (b), (c), and (e) of the above, and the award of punitive damages. In the alternative Z Frank seeks a remittitur or a new trial. Z Frank also seeks a judgment as a matter of law on the Magnuson-Moss Count on statute of limitations grounds.

ACTUAL DAMAGES

Z Frank seeks to knock out the repair costs, loss of use and aggravation, etc. on the basis that Perez failed to produce any evidence that these items were proximately caused by the mileage or the multiple owners of the vehicle. Z Frank correctly points out that these, like any item of damages resulting from a tort must be causally related. It further asserts that Perez produced no evidence as to any such causal relationship. Perez responds by arguing that Z Frank stipulated to the specific repair damages, that his expert Dicklich testified that an automobile should not have needed all of these repairs until about 120,000 miles, and that the court refused to let his expert mechanic testify as to the causal relationship.

With respect to the repairs, loss of use, and aggravation, etc., the court does find that plaintiff did not produce any evidence to justify finding a causal relationship. Perez merely introduced evidence he had paid for certain unspecified repairs. The reason that the court did not allow Perez' expert mechanic to testify was that the expert had not examined the car and could not provide any basis for tying any specific repair to the mileage or multiple ownerships of the vehicle. There can be a multitude of reasons why a car may need repairs. For example, if the car had been in a wreck, the cost of repairs could not be charged to excessive mileage. The fact of the matter is that it is too speculative to say that the repairs (and resultant loss of use and aggravation) were occasioned by the mileage and not some other cause. *Verdonck v. Scopes*, 226 Ill. App. 3d 484, 168 Ill. Dec. 908, 914, 590 N.E.2d 545 (2nd Dist. 1992) and *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093, 1094-5 (N.D.Ind. 1986), both hold that, although repair bills can be a part of a plaintiff's claim, it is necessary to show a causal relationship between the repairs and the excess mileage. The propensity of an excessively driven car to need repairs is already factored into

the value of the car so that plaintiff received recompense when the jury awarded the difference between the repairs and the actual value of the care. Likewise with the so-called "aggravation, humiliation, or inconvenience." It is obvious that these items were a result of the repairs and loss of use. If the underlying cause was not proved to be causally related, then that which results from the underlying cause is likewise not proved to be causally related. With respect to Z Frank's alleged stipulation to the repair bills, what was "stipulated" was the foundation and relevance. Z Frank made it very clear at trial that it was not agreeing that Perez had proved that they were proximately caused by the excess mileage.

Accordingly, the court grants Z Frank's motion and enters judgment in favor of defendant on items (b), (c), and (e) of the jury's verdict.

ALLEGED DUPLICATIVE DAMAGES

The two odometer statutes require trebling of compensatory damages. Z Frank contends that if the damages are trebled and plaintiff is awarded punitive damages them he will have a double recovery. Perez however argues that the punitive damages were awarded on the fraud count and consequently he is entitled to an award of both.

The law appears to be on Z Frank's side. The precise issue was faced in *Verdonck v. Scopes*, 168 Ill. Dec. at 913. The court there pointed out that treble damages and punitive damages serve the same function: to punish the wrongdoer. The wrongful behavior is the sale of an automobile through fraudulent representations. One of the fraudulent representations was the mileage. There were others of course, including the number of previous owners. Thus Perez should not be limited to treble

damages. Z Frank should however receive credit and a set off from the punitive damages awarded of the amount the compensatory damages are increased by trebling.

PUNITIVE DAMAGES

Z Frank argues that the court should grant a judgment not withstanding the verdict with respect to the entire punitive damages award. It argues that *Medcom Holding Co. v. Baxter Travelog Laboratories*, 106 F.3d 1388 (7th Cir. 1997) controls. However all Medcom does is attempt to describe the Illinois law on punitive damages. Certainly Illinois requires exceptional circumstances to justify the imposition of punitive damages. Viewing the evidence in a light most favorable to Perez we see Z Frank selling Perez an automobile that cost more than he wanted to pay, by assuring him that it was a single owner automobile with a mere 28,000 miles on it. Instead it had eight previous owners (one of them an auto rental agency) with over 100,000 miles on it. The evidence further showed that Z Frank had repaired the automobile prior to delivery to Perez. In applying for warranty information, as it most certainly did, it must have been aware of the discrepancy between the actual mileage and the odometer. Although Perez did not prove at trial a causal relation between the actual repairs and the mileage on the car, nevertheless it is obvious that a multi-owner automobile with four times the mileage would not function as well as one with the attributes promised by Z Frank. The evidence further showed that Z Frank received evidence of the roll back from State of Tennessee but did nothing about notifying Perez. The jury found with good reason that Z Frank, in selling the car to Perez under these circumstances, was guilty of fraud. This conduct was more than sufficient to justify the imposition of punitive damages. The motion for a Judgment is denied.

THE PUNITIVE DAMAGES INSTRUCTION

Z Frank submitted alternative punitive damages instructions. Since the punitive damage claim was pursuant to Illinois law the court instructed the jury, by giving Z Frank's alternative, but least preferred instruction, IPI 800.06. This instruction is in accord with Illinois law and its giving was proper. See *Home Savings & Loan Association v. Schneider*, 108 Ill. 2d 277, 91 Ill. Dec. 590, 593, 483 N.E.2d 1225 (1985) after which IPI 800.06 was drafted. There is not a single decision holding IPI 800.06 is not a correct statement of Illinois law. The basic difference between IPI 800.06 and Z Frank's preferred instruction is that the latter is drafted in the negative, i.e., what it is not, and is prolix. Giving IPI 800.06 was not error.

AMOUNT OF PUNITIVE DAMAGES

The jury awarded Perez $ 550,000.00 in punitive damages. It is obvious that this is a lot of money. It is substantially higher than the award of compensatory damages awarded by the jury and of course higher still than the award of compensatory damages after the court's grant of the motion to reduce the award. Is it too high? As pointed out by the Illinois Supreme Court, punitive damages serve a penal purpose and are awarded not as compensation but for reasons of retribution and deterrence. *Loitz v. Remington Arms Co., Inc.*, 138 Ill. 2d 404, 150 Ill. Dec. 510, 515, 563 N.E.2d 397 (1990). There are four factors for a court to consider in determining whether the amount of punitive damages awarded is excessive. See *e.g.*, *Hazelwood v. Illinois Gulf Central RR.*, 114 Ill. App. 3d 703, 450 N.E.2d 1199, 71 Ill. Dec. 320 (4th Dist. 1983). They are, first, the nature and enormity of the wrong; second, financial status of the defendant which is relevant to the issue of deterrence; third, the need to deter others; and fourth, the

potentiality of liability of the defendant beyond the present litigation. Since there is no issue of multiple liability, we will examine the first three.

With regard to the first factor, we find a situation where there exists a great disparity in knowledge between the seller (Z Frank) and buyer (Perez). Not only does the auto dealer have access to computer information on a car's history, it also has trained mechanics who should be able to tell whether a car has been excessively driven. There is evidence in this case that Z Frank must have known the actual mileage and pedigree of the car in question. One of the undisclosed previous owners was a leasing agency. Yet they sold the car to Perez despite his stated desire for a one-owner, low mileage, automobile. There is evidence that Z Frank received notification that the car's odometer had been rolled back, yet it took no steps to notify Perez. The evidence further shows that the car was a lemon, nevertheless Z Frank refused to refund Perez' money despite requests. Congress found that buyers of motor vehicles rely heavily on the odometer reading as an index of the condition and value of a vehicle and an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle. 49 U.S.C. § 32701 (a) The sale of a vehicle sold by Z Frank to Perez under these circumstances certainly qualifies as an enormous wrong committed by Z Frank.

With regard to the second factor, there was no evidence of the financial wherewithal of Z Frank, even though it was stipulated that it was no longer in business. Z Frank argues, instead of impecuniousness, that it can no longer be deterred because it is not in business. However, there was no evidence that Z Frank could not return to business and the third factor, deterrence of others, is extremely important in this case. According to Perez' witness Bradley, a state of Tennessee investigator, odometer roll backs are a nationwide problem and

needs to be deterred. Both the state of Illinois and the United States have seen fit to enact statutes to deal with this problem. An award of punitive damages such as the one awarded by the jury in this case will not fall on deaf ears. Automobile agencies who would not be scared off by a small award of compensatory damages, even if the award is trebled, will undoubtedly be scared off by this award of over one-half million dollars.

In summary the court finds that after evaluating the factors that matter to Illinois it is not appropriate to second guess the jury's decision to ward $ 550,000.00 in punitive damages.

MAGNUSON-MOSS

The court with respect to Perez' Magnuson-Moss claim, denied Z Frank's motion for judgment on the pleadings which was based on the four year statute of limitations contained in a similar Illinois law. The vehicle was delivered on May 1, 1993 but the complaint was not filed until December 30, 1997. Perez argues that equitable tolling applies because this doctrine is read into every federal statute. Z Frank argues that equitable tolling only is applied when the defendant has taken affirmative steps beyond the wrongdoing which forms the basis of the complaint to prevent the plaintiff from suing in time. However there are two tolling doctrines grafted onto federal statutes of limitations. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). The first is equitable estoppel which extends the statute of limitations where a defendant has taken efforts to prevent a claimant from filing his suit on time. The other is the discovery rule which extends the statute of limitations if, despite due diligence, he is unable to obtain vital information bearing on the existence of his claim. *Id.* Arguably both help Perez. There is plenty of evidence that in all probability Z Frank knew of the actual mileage when it sold Perez the automobile and yet it filled in the false mileage in the disclosure it made to Perez. However,

there is no question that Perez did not find out about the false disclosure until he was notified by the Tennessee officials. There certainly is no requirement that an automobile buyer conduct an independent investigation of the mileage. While it is true that Perez knew he had been sold a lemon prior to the running of the statute of limitations he did not know about the mileage roll back and his claim here is based on the latter and not the former.

ILLINOIS CONSUMER FRAUD CLAIM

The court reserved ruling on Perez' Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 et seq.) count. Here Z Frank's actions were both unfair and deceptive, and were so found by the jury. The court agrees and finds that Perez should have judgment against Z Frank in the same amount as on the common law fraud count, including the punitive damages.

Z FRANK'S COUNTERCLAIM AGAINST PORTAGE AUTO

Z Frank filed and served a counterclaim on Portage Auto for contribution. Plaintiff has objected on the ground that one guilty of fraud ought not get contribution. He contends that since he has a judgment against Portage also, it would make it more difficult for him to collect on his judgment. But since Z Frank's claim against Portage is derivative, it could only help plaintiff since plaintiff is only entitled to collect once. However, punitive damages are personal and are not subject to reimbursement. *Farwell v. Becker,* 129 Ill. 261, 21 N.E. 792 (1889); *Hall v. Archer-Daniels-Midland Co.,* 142 Ill. App. 3d 200, 96 Ill. Dec. 600, 491 N.E.2d 879 (4th Dist. 1986). Judgment is entered in favor of Z Frank and against Portage Auto on the counterclaim

in the same amount as entered against Z Frank with the exception of the punitive damages.

CONCLUSION

The court grants Z Frank's motion in part and denies it in part. The ruling of the court is as follows:

a. The court reduces Perez' compensatory damages to the sum of $ 11,500.00;

b. The court trebles said amount to $ 34,500.00;

c. The court reduces the punitive damages by said amount to $ 515,500.00;

d. The court finds that Perez should have judgment against Z Frank on the Magnuson-Moss count in the same amount as on the common law fraud count, including the punitive damages;

e. The court finds in favor of Z Frank and against Portage Auto on the counterclaim in the same amount as entered against Z Frank with the exception of the punitive damage; and

f. The balance of Z Frank's motion is denied.

IT IS SO ORDERED.

/S/
Harry D. Leinenweber, Judge
United States District Court

Date: June 10, 1999

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60605

September25, 2000

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION,Circuit Judge

MIGUEL PEREZ,
Plaintiff-Appellee,
Cross-Appellant,

Nos. 99-2742, 99-2854, v.
00-1701 & 00-1786

Z FRANK OLDSMOBILE, INC.,
Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 97 C 8950--Harry D. Leinenweber, Judge.

Order

Plaintiff-appellee, cross-appellant filed a petition for rehearing and petition for rehearing en banc on August 14, 2000. No judge* in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore denied.

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*Chief Judge Flaum did not participate in the consideration of this case.

STATUTES AND RULES INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652

Section 1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Section 5/3-112.1(e) of the Illinois Vehicle Code (625 ILCS).

(e) When the transferor signs the title transfer such transferor acknowledges that he or she is aware that Federal regulations and State law require him or her to state the odometer mileage upon transfer of ownership. An inaccurate or untruthful statement with intent to defraud subjects the transferor to liability for damages to the transferee pursuant to the federal Motor Vehicle Information and Cost Act of 1972, P.L. 92-513 as amended by P.L. 94-364. No transferor shall be liable for damages as provided under this Section who transfers title to a motor vehicle which has an odometer reading that has been altered or tampered with by a previous owner, unless that transferor knew or had reason to know of such alteration or tampering and sold such vehicle with an intent to defraud. A cause of action is hereby created by which any person who, with intent to defraud, violates any requirement imposed under this Section shall be liable in an amount equal to the sum of:

(1) three times the amount of actual damages sustained or $1,500, whichever is the greater; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

Any recovery based on a cause of action under this Section shall be offset by any recovery made pursuant to the federal Motor Vehicle Information and Cost Act of 1972.

Rule 20 of the Rules of the Illinois Supreme Court.

Rule 20. Certification of Questions of State Law From Certain Federal Courts

(a) Certification. When it shall appear to the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit, that there are involved in any proceeding before it questions as to the law of this State, which may be determinative of the said cause, and there are no controlling precedents in the decisions of this court, such court may certify such questions of the laws of this State to this court for instructions concerning such questions of State law, which certificate this court, by written opinion, may answer.

Rule 52 of the local rules of the United States Court of Appeals for the Seventh Circuit.

Certification of Questions of State Law

(a) When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a

case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified. The certification will be made after the briefs are filed in this court. A motion for certification shall be included in the moving party's brief.

(b) If the state court decides the certified issue, then within 21 days after the issuance of its opinion the parties must file in this court statements of their positions about what action this court should take to complete the resolution of the appeal.